United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF AND APPENDIX FOR THE APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,058

THOMAS V. PEW,

Appellant

v.

COMMANDANT, UNITED STATES
COAST GUARD,

Appellee.

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ON APPEAL FROM AN ORDER AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JOHN W. DOUGLAS,
Assistant Attorney General,

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QUESTION PRESENTED

A seaman, informed that he was physically unfit for sea duty, in order to avoid a charge of incompetence, voluntarily deposited with the Coast Guard his engineer's license and merchant mariner's document "until such time as the Coast Guard is furnished with a certificate from a United States Public Health facility that * * *[he is] considered to be fit for sea duty." The question is whether the seaman may compel the Coast Guard to return his license and document without any certification that he is physically fit for sea duty.

INDEX

CITATIONS

Cases:

* Cases or authorities chiefly relied upon are marked by asterisks.

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COUNTER-STATEMENT OF THE FACTS

Appellant brought this suit in the district court to require the Commandant of the Coast Guard to return to appellant the license and merchant mariner's document which appellant voluntarily had surrendered to the Coast Guard. The district court rendered summary judgment for the Commandant.

The facts are not in dispute and may be summarized as follows:

In September 1962, Thomas V. Pew, the appellant, secured an assistant engineer's license from the United States Coast Guard. On March 12, 1963, he applied to States Marine Lines for a position as third assistant engineer aboard the SS GREEN MOUNTAIN STATE. The Examining Physician reported to the United

States Public Health Service that appellant had been examined "and found medically unacceptable for employment in this capacity" because (App. 11a):[1]

> Seaman exhibits moderate irregular involuntary movements of the limbs and facial muscles. Respectfully request neurological survey to rule out Sydenham's Chorea. [2]

On that same day, March 12, appellant appeared at the Merchant Marine Investigative Section of the United States Coast Guard in New York and executed the "Voluntary Deposit Agreement" which is set forth infra, App.9a-10a.[3] This agreement recited that, "in order to avoid a charge of incompetence under the provision of R.S. 4450, as amended, and a possible finding of incompetence," appellant voluntarily deposited his license and merchant mariner's document with the Coast Guard. The agreement further provided:

> It is understood and agreed that this voluntary deposit agreement will remain in effect until such time as the Coast Guard is furnished with a certificate from a Public Health facility that I am considered to be fit for sea duty. * * *
>
> By accepting this deposit the Coast Guard agrees to return my [license and document] * * * to me promptly upon presentation of the above certificate from the U.S. Public Health facility certifying I am fit for sea duty.

1/ As no joint appendix has been filed, for the convenience of the Court we are appending to this brief certain portions of the record.

2/ "A nervous disorder characterized by spasmodic twitchings and other involuntary movements; * * * St. Vitus' dance * * *." Webster's New International Dictionary, 2d Ed. unabridged.

3/ In his complaint, appellant asserted that he had "signed license back to the U.S. Coast Guard on February, 1963" (App. 1a). This date probably is wrong; the agreement is dated March 12.

The affidavit of Captain Parker, Chief, Merchant Vessel Personnel, of the Coast Guard, shows that neither appellant nor anyone acting in his behalf "ever presented to the Coast Guard a certificate from a U.S. Public Health facility or any other medical authority certifying that the said Thomas V. Pew was fit for sea duty * * *" (App.7a-8a).

Appellant requested that the Coast Guard return his license and document (App. 1a). The Coast Guard refused to do so. Appellant then sought in the district court a "writ of error" to require the return of the license and document (App. 1a). The Commandant filed a motion for summary judgment (App. 2a) supported by the affidavit of Captain Parker (App.5a-8a). The district court granted summary judgment for the Commandant (App. 12a).

STATUTES AND REGULATIONS INVOLVED

1. 46 U.S.C. 224 (R.S. 4438 as amended) provides:

§ 224. Licensing of officers

The Coast Guard shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters of sail vessels of over seven hundred gross tons, and all other vessels of over one hundred gross tons carrying passengers for hire. It shall be unlawful to employ any person or for any person to serve as a master, chief mate, engineer, or pilot of any steamer or as master of any sail vessel of over seven hundred gross tons or of any other vessel of over one hundred gross tons carrying passengers for hire who is not licensed by the Coast Guard; and anyone violating this section shall be liable to a penalty of $100 for each offense.

2. 46 U.S.C. 229 (R.S. 4441 as amended) provides:

§ 229. Licenses of engineers

Whenever any person applies for authority to perform the duties of engineer of any steam vessel, the Coast Guard shall examine the applicant as to his knowledge of steam machinery, and his experience as an engineer, and also the proofs which he produces in support of his claim; and if, upon full consideration, it is satisfied that his character, habits of life, knowledge, and experience in the duties of an engineer are all such as to authorize the belief that he is a suitable and safe person to be intrusted with the powers and duties of such a station, it shall grant him a license, authorizing him to be employed in such duties for the term of five years, in which it shall assign him to the appropriate class of engineers; but such license shall be suspended or rovoked upon satisfactory proof of negligence, unskillfulness, intemperance, or the willful violation of any provision of title 52 of the Revised Statutes. Whenever complaint is made against any engineer holding a license authorizing him to take charge of the boilers and machinery of any steamer, that he has, through negligence or want of skill, permitted the boilers in his charge to burn or otherwise become in bad condition, or that he has not kept his engine and machinery in good working order, it shall be the duty of the Coast Guard, upon satisfactory proof of such negligence or want of skill, to revoke the license of such engineer and assign him to a lower grade or class of engineers, if it finds him fitted therefor.

3. 46 U.S.C. 672(b) (38 Stat. 1169 as amended) provides:

§ 672. Requirements, qualifications, and regulations as to crews -- Qualifications

* * *

Certificate of service as able seaman

(b) Application may be made to the Coast Guard for a certificate of service as able seaman, and upon proof being made to the Coast Guard by affidavit and examination, under rules approved by the Commandant of the Coast Guard, showing the nationality and age of the applicant, the vessel or vessels on which he has had service, that he is skilled in the work usually performed by able seamen, and that he is

entitled to such certificate under the provisions of this section, the Coast Guard shall issue to said applicant a certificate of service as able seaman, which shall be retained by him and be accepted as prima-facie evidence of his rating as an able seaman.

4. 46 U.S.C. 239(b) (R.S. 4450) provides:

> § 239. Investigation of marine casualties -- Casualty involving loss of life; reports
>
> Casualty not involving loss of life; classification
>
> (b) The Commandant of the Coast Guard shall establish rules and regulations for the investigation of marine casualties and accidents not involving loss of life, any act in violation of any of the provisions of title 52 of the Revised Statutes or of any of the regulations issued thereunder, and all cases of acts of incompetency or misconduct committed by any licensed officer or holder of a certificate of service while acting under the authority of his license or certificate of service, whether or not any of such acts are committed in connection with any marine casualty or accident. The Commandant of the Coast Guard shall classify marine casualties and accidents not involving loss of life according to the gravity thereof and in making such classification the commandant shall give consideration to the extent of injuries to persons, the extent of property damage, the dangers actual or potential which such marine casualties or accidents may create to the safety of navigation or commerce.

5. 46 U.S.C. 239(d) (R.S. 4450) provides:

> Immediate investigation of conduct, violations and casualties; extent of investigation; right to counsel
>
> (d) All acts in violation of any of the provisions of title 52 of the Revised Statutes or of any of the regulations issued thereunder, whether or not committed in connection with any marine casualty or accident, and all acts of incompetency or misconduct, whether or not committed in connection with any marine casualty or accident, committed by any licensed officer acting under authority of his license or by any chief or assistant steward, purser, radio operator, electrician, able seaman, or lifeboat man acting under authority of a certificate of service issued to him

by the Bureau of Marine Inspection and Navigation or the Coast Guard, and all marine casualties and accidents and the attendant circumstances shall be immediately investigated as provided in subsections (a) and (b) of this section. The investigation shall determine, as far as possible, the cause of any such casualty or accident, the person responsible therefor, and whether or not the United States Government employees charged with the inspection of the vessel or the vessels involved and with the examination and licensing of the officers thereof have properly performed their duties in connection with such inspection, examination and licensing. In all investigations conducted under the authority of this section, any owner, licensed officer, or any holder of a certificate of service, or any other person whose conduct is under investigation, or any other party in interest, shall be allowed to be represented by counsel, to cross-examine witnesses, and to call witnesses in his own behalf, and a full and complete record of the facts and circumstances shall be submitted to the Commandant of the Coast Guard.

6. 46 U.S.C. 239(J) (R.S. 4450) provides:

Rules and regulations

(j) The Commandant of the Coast Guard shall make such regulations as may be necessary to secure the proper administration of this section.

7. 46 C.F.R. 137.10-1 provides:

Subpart 137.10 -- Deposit or Surrender of License, Certificate or Document

§ 137.10-1 Voluntary deposit in event of mental or physical incompetence.

(a) A person may deposit his license, certificate or document with an investigating officer in any case where there is evidence of mental or physical incompetence for any reason other than when caused by use of, or addiction to, narcotics.

(b) A voluntary deposit is accepted on the basis of a written agreement which specifies the conditions accompanying the deposit. The original or a copy will be given to the person making the deposit. The Coast Guard agrees to return the license, certificate or document deposited by the person described therein when he obtains a certificate from the U.S. Public Health Service, or other authorized medical officer showing the person is considered to be fit for sea duty.

(c) Where the mental or physical incompetence of a holder of a license, certificate or document is caused by use of, or addiction to, narcotics, such person may only surrender such license, certificate or document in accordance with §137.10-10.

§ 137.10-10 Voluntary surrender to avoid hearing.

(a) Any person may surrender his license, certificate or document to an investigating officer in preference to appearing at a hearing.

(b) Whenever a person voluntarily surrenders his license, certificate or document, he shall sign a written statement containing the following stipulations that:

(1) This surrender is made voluntarily in preference to appearing at a hearing;

(2) All title to the license, certificate or document surrendered is permanently relinquished; and,

(3) His rights with respect to a hearing, appeal, and review are waived.

(c) A voluntary surrender of a license, certificate or document to an investigating officer in preference to appearing at a hearing should not be accepted by an investigating officer unless the investigating officer is convinced that the seaman fully realizes the effect of such surrender.

8. 46 C.F.R. 12.02-5(a) provides:

§ 12.02-5 Form in which documents are issued.

(a) Every certificate of service, certificate of efficiency, or certificate of identification issued or reissued after November 1, 1945, shall be in the form of a merchant mariner's document, Coast Guard Form 2838, and wherever such certificates are mentioned in this part they shall be deemed to include merchant mariner's documents representing such certificates.

9. 33 C.F.R. 121.01(a) provides:

§ 121.01 Requirements for special validation endorsement

(a) Except as otherwise provided in this

section no person shall be employed on a merchant vessel of the United States of 100 gross tons or over unless he is in possession of a Merchant Mariner's document bearing a special validation endorsement for emergency service.

ARGUMENT

I. UNDER VALID REGULATIONS PROMULGATED BY THE COMMANDANT, APPELLANT'S LICENSE AND DOCUMENT MAY NOT BE RETURNED TO HIM UNTIL HE HAS FURNISHED THE CERTIFICATE OF FITNESS REQUIRED BY THE VOLUNTARY DEPOSIT AGREEMENT

By 46 U.S.C. 224, 229 and 672(b) (supra, pp. 3-4), the Coast Guard is authorized to issue officers' and engineers' licenses and seamen's certificates. A seaman's certificate is issued "in the form of a merchant mariner's document." 46 C.F.R. 12.02-5(a) (supra, p. 7). Every person "employed on a merchant vessel of the United States of 100 gross tons or over" must possess a merchant mariner's document. 33 C.F.R. 121.01(a) (supra, pp. 7-8).[4/] 46 U.S.C. 672(a) provides that to obtain a seaman's certificate a person must "upon examination, under rules prescribed by the Coast Guard as to eyesight, hearing, and physical condition * * * [be] found to be competent * * *."

The Commandant of the Coast Guard is authorized to suspend or revoke the license or certificate of service should he find the licensed officer or holder to be "incompetent." 46 U.S.C. 239(g). To that end he is required to investigate "all acts of incompetency * * * committed by any licensed officer acting

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4/ These regulations were enacted pursuant to the Magnuson Act, 64 Stat. 427, 1038, 50 U.S.C. 191 et seq. and Executive Order 10173 (15 F.R. 7005, 3 C.F.R. 1950 Supp.) as amended by Executive Orders 10277 (16 F.R. 7537, 3 C.F.R. 1951 Supp.) and 10352 (17 F.R. 4607, 3 C.F.R. 1952 Supp.).

under authority of his license or by any * * * able seaman * * * acting under authority of a certificate of service * * *." 46 U.S.C. 239(d) (R.S. 4450).[5] By section 239(j), the Commandant is directed to "make such regulations as may be necessary to secure the proper administration of the section."

To allow a person in appellant's position to "avoid a charge of incompetence * * * and a possible finding of incompetence," the Commandant permits such a person to deposit his license or document with the Coast Guard until he provides the Coast Guard with a certificate of physical fitness for sea duty. The regulation, 46 C.F.R. 137.10-1 (supra, p. 6), authorizes voluntary deposit of a seaman's license or document "with an investigating officer in any case where there is evidence of mental or physical incompetence * * *." 46 C.F.R. 137.10-1(b) specifically provides that "the Coast Guard agrees to return the license, certificate or document deposited by the person described therein when he obtains a certificate from the U.S. Public Health Service, or other authorized medical officer showing the person is considered to be fit for sea duty." Appellant executed a voluntary deposit agreement permitted by this regulation. The regulation is authorized by and consistent with

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5/ Appellant is wrong in asserting (February 1, 1965 Memo "To Whom It May Concern") that "the only case of hearing * * * is case of marine casualty or accident." 46 U.S.C. 239(d) expressly extends to all acts of incompetency * * * whether or not committed in connection with any marine casualty or accident * * *."

the statute. Appellant could have awaited formal charges of incompetence and gone through an investigatory hearing. However, once the charges were made the fact that they had been made would remain on his record. Alternatively, he may choose to surrender his certificate until such time as he may submit a certificate of physical competence from a medical authority. Thus the question of his physical fitness may be resolved without imposing on his records any suggestion of incompetence.[6/] Appellant's claim[7/] that he has been deprived of his papers without due process of law is without merit.

Indeed, a procedure similar to but more restrictive than that here at issue was approved in Word v. United States, 223 F. Supp. 614 (S.D. Ala. 1963). There, the seaman voluntarily surrendered his papers "in preference to appearing at a hearing." As provided in 46 C.F.R. 137.10-10 (which is not involved in this case) the seaman "permanently relinquished" title to his papers and waived his rights to a hearing, appeal and review. The court upheld the regulation and refused to order the return of the papers (223 F. Supp. at 616-617):

6/ This is not a situation such as was presented in In re Merchant Mariners Documents Issued to Dimitratos, 91 F. Supp. 426 (N.D. Calif. 1949). In that case, the Coast Guard sought to compel seamen to surrender their papers prior to a hearing. The court held that since the statute required a hearing before deprivation of license, the seamen could not be deprived of their licenses prior to the hearing.

7/ Designation of Points of Record, para.5A.

The provisions of 46 C.F.R. 137.05-7 (now Section 137.10-10) are proper as regulations necessary to secure the administration of 46 U.S.C. § 239, as authorized by 46 U.S.C. § 239(j). Such regulation does not enlarge the power granted the Coast Guard under 46 U.S.C. § 239(g) to suspend or revoke licenses or certificates of service. Such regulation is not inconsistent in that it provides for a voluntary surrender of the document or certificate by the person whose conduct is under investigation, while 46 U.S.C. § 239(g) provides for affirmative action on the part of the Commandant of the Coast Guard to suspend or revoke the document or certificate of such person. Administrative construction of a statute is entitled to great weight, and regulations are to be sustained unless unreasonable and plainly inconsistent with the statute. United States v. Ekberg, 291 F. 2d 913 (8th Cir. 1961).

No actions of the defendant Coast Guard appear to be arbitrary, capricious, abuse of discretion, in excess of statutory jurisdiction or authority, or without observance of procedure required by law. In the absence of a finding that was clearly erroneous, and in the absence of a showing of arbitrary or like misconduct, findings and orders of the Coast Guard Commandant relative to matters of certificates of service and merchant mariners' documents pursuant to an investigation of maritime casualties should be affirmed. In re Certificates of Service and Merchant Mariners' Documents issued to Soto et al., 73 F. Supp. 725 (S.D.N.Y. 1947).

The basis of appellant's claim is, in substance, that he should not be required to secure a certificate of fitness because (a) he passed a physical examination when he secured his license and (b) unless he is permitted to go to sea he will "have no recourse for cure" (Designation of Points of Record, para. 5B). The physical examination which appellant passed in September 1962, eight months prior to his attempt to secure employment, was that required by 46 U.S.C. 672(a), and has nothing to do with subsequent incompetence. See Hazelton v. Luckenbach Steamship Co., 134 F. Supp. 525, 527 (D. Mass. 1955) (holding, inter alia, that a seaman's "fit

for duty" certificate did not relieve him of the obligation not to conceal past hospitalization).

It is true that, as appellant urges, unless he has his papers he cannot work on a ship, and if he cannot work on a ship he will "have no recourse for cure." 42 U.S.C. 249; Vaughn v. Atkinson, 369 U.S. 527, 531. However, it would be grossly inequitable to permit claimant to retrieve his papers in order that he might find an employer whom he could hold responsible for maintenance and cure should he in fact be physically unfit. This is especially true of this particular appellant, who never has worked as a seaman: the suspicion of physical incompetence arose on his first attempt to secure maritime employment. If appellant's papers were returned, and he did find work -- perhaps by virtue of a less thorough pre-employment physical examination -- the employer would be liable for maintenance and cure even though the illness were pre-existing; and appellant's failure to reveal the possibility of Sydenham's Chorea probably would not relieve the shipowner of that liability. Aguilar v. Standard Oil Co., 318 U.S. 724, at 730-731; Lindquist v. Dilkes, 127 F. 2d 21 (C.A. 3, 1942); Tawada v. United States, 162 F. 2d 615 (C.A. 9, 1947); Ahmed v. United States, 177 F. 2d 898 (C.A. 2, 1949); Dragich v. Strika, 309 F. 2d 161 (C.A. 9, 1962).

Appellant voluntarily executed the deposit agreement. The regulation which authorizes the agreement requires that the Coast Guard retain the papers until certification of medical competence is furnished. This same condition is set

forth in the voluntary deposit agreement which appellant executed (App. 9a). As Captain Parker's affidavit states, "in the circumstances the United States Coast Guard under the pertinent regulations and the terms of the annexed voluntary deposit agreement is not authorized to release the license and Merchant Mariner's Document claimed * * *" (App. 8a).

The interests of justice -- as well as the statute and regulations -- require that the Coast Guard retain appellant's papers until he obtains a certificate of physical fitness.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

JOHN W. DOUGLAS,
Assistant Attorney General,

DAVID C. ACHESON,
United States Attorney,

SHERMAN L. COHN,
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Attorneys.

APRIL 1965

A P P E N D I X

PLEA FOR WRIT OF ERROR, U.S. DISTRICT COURT, JUNE 29, 1964

Thomas V. Pew
U.S. Citizen, seaman
Mailing Address:
General Delivery,
Washington, D.C.
vs.
Commandant, U.S. Coast Guard
Washington, D.C.

in U.S. District Court
D.C. District

Jurisdiction rests on the fact that defendant is a U.S. official whose place of business is Washington, D. C.

1. Sensible remedies in administrative law having been exhausted, and defects in administrative prodecure until now shown herein, (with a brief statement of facts presented):

A. License as second assistant engineer of steam vessels, and third assistant engineer of diesel propulsion vessels was obtained by the plaintiff after passing the usual written exam under supervision of the Coast Guard inspector, and physical examination under medical jurisdiction of the U.S. Public Health Service, in Sept., 1962,

B. Above plaintiff, after being refused employment by the States Marine Lines (which company requested employee from the National M.E.B.A., authorized bargaining representative) signed license back to the U.S. Coast Guard on Feb., 1963,

C. Having a U.S. Coast Guard order for another U.S. Public Health Service physical examination (on legally unsound basis, in the opinion of the plaintiff), the plaintiff, after talking to U.S. P.H.S. personnel in New York, Baltimore, and Los Angeles, and finding that the requirement for qualifying for normal U.S.P.H.S. service is two months sea time immediately preceding making use of this service, plaintiff requested in writing that his license be returned to him on the legal grounds that the U.S. P.H.S. jurisdiction had been satisfied as to competency five months previous to above employer's refusal to employ, and that fifteen minutes cursory examination of above employer's physician would not outweigh this evidence (and also the right of a free person to change his mind, the fact that an action for possible incompetency initiated as part of U.S. Coast Guard policy by the possible "incompetent" himself would not be legally sound, and the fact that if the plaintiff should follow above U.S. Coast Guard directions, and then be found "unfit for sea duty", he would have no recourse for cure by above U.S. P.H.S. regulations, are here involved), and was refused;

2. A writ of error in the above initial refusal of the U.S. Coast Guard on Nov., 1963, to return the above mentioned licenses to the plaintiff, and further that the above licenses be returned to same at the above address, is hereby pleaded.

SIGNED: Thomas V. Pew

[CAPTION OMITTED]

MOTION FOR SUMMARY JUDGMENT

Now comes defendant Commandant of the United States Coast Guard and moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the following grounds:

(1) That plaintiff's action is for the return of his license and Merchant Mariner's Document presently held by defendant Commandant;

(2) That the aforesaid license and Document were obtained by defendant Commandant in the proper performance of his duties and under authorized official regulations governing matters concerning the issuance and deposit of all such certificates, licenses and documents; and

(3) That defendant Commandant's action in retaining plaintiff's license and Document is not manifestly unfair, lacking in supporting evidence, illegally arrived at or in abuse of direction.

(4) That there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law.

This motion is based upon the complaint herein, the affidavit of Captain Lynn Parker USCG) and defendant's supporting memorandum submitted herewith.

UNITED STATES ATTORNEY

DANIEL E. LEACH
Attorney, Admiralty & Shipping Section
Department of Justice
Washington, D. C. 20530

Of Counsel

[CAPTION OMITTED]

STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes defendant Commandant of the United States Coast Guard and, pursuant to local rule 9, makes the following statement of material facts as to which he contends there is no genuine issue:

(1) That plaintiff was a seaman duly licensed by the United States Coast Guard until March 12, 1963 (Complaint, paras. 1B, 1C; Parker Affidavit, para.2).[1/]

(2) That on March 12, 1963, plaintiff was refused employment by States Marine Lines for medical incompetence (Complaint, para. 1B; Parker Affidavit, para. 6).

(3) That on March 12, 1963, plaintiff entered into a voluntary deposit agreement with the United States Coast Guard wherein he agreed, inter alia, to -

> voluntarily deposit * * * [his] License #311543 and MMD #BK-057927 * * * with the U.S. Coast Guard Investigating Section. [Parker Affidavit, para. 3.]

(4) That plaintiff's license and Merchant Mariner's Document were voluntarily deposited on information that plaintiff was then "presently, physically or mentally, unfit for sea duty"

1/ References to plaintiff's complaint or "Plea for Writ of Error" herein and the affidavit of Captain Lynn Parker, USCG, filed in support of defendant's motion.

and further, "to avoid a charge of incompetence * * * and a possible finding of incompetence" (Parker Affidavit, para. 3).

(5) That plaintiff's information concerning his medical incompetence (Complaint, para. 1B, 1C) was confirmed by the letter of March 12, 1963, from the examining physician for States Marine Lines (Parker Affidavit, para. 7).

(6) That in the aforesaid voluntary deposit agreement, plaintiff further agreed -

> that this voluntary deposit agreement will remain in effect until such time as the Coast Guard is furnished with a certificate from a U.S. Public Health facility that * * *[he is] considered to be fit for sea duty. [Parker Affidavit, para. 3, 4.]

(7) That since March 12, 1963 (the date of the aforesaid voluntary deposit agreement) the Coast Guard has not been furnished with a certificate from a U.S. Public Health facility or any other medical authority certifying that plaintiff is fit for sea duty.

UNITED STATES ATTORNEY

DANIEL E. LEACH
Attorney, Admiralty & Shipping Section
Department of Justice
Washington, D. C. 20530

Of Counsel

[CAPTION OMITTED]

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CAPTAIN LYNN PARKER, United States Coast Guard, being first duly sworn, deposes on oath and says:

1. That he is Chief, Merchant Vessel Personnel, within the Office of Merchant Vessel Personnel, United States Coast Guard, Washington, D. C., and as such it responsible for, among other things, supervising the administration of certain rules and regulations promulgated by the Commandant of the United States Coast Guard regarding the issuance, surrender, deposit and revocation of licenses, documents and certificates for merchant vessel personnel and that he makes the following statement on the basis of his personal knowledge and belief supported by his review of the official records contained in his office and believes the matters herein stated to be true and correct.

2. That on March 12, 1963, Thomas V. Pew appeared in the Office of the Merchant Marine Investigation Section, United States Coast Guard, United States Custom House, New York and there agreed to and, in fact, did voluntarily deposit his License No. 311543 and Merchant Marine Document No. BK-057927 having been informed that he was then physically or mentally unfit for sea duty.

3. That annexed hereto as Exhibit A is the voluntary deposit agreement entered into between the United States

Coast Guard, Merchant Marine Investigative Section, and the said Thomas V. Pew. The agreement, dated 12 March 1963, is a part of the official records of the United States Coast Guard.

4. That the aforesaid voluntary deposit agreement was executed pursuant to regulations promulgated by the Commandant of the United States Coast Guard and published in 46 C.F.R. § 137.10-1 which require, in part, that:

> A voluntary deposit [of a license, certificate or document in cases where there is evidence of mental or physical incompetence] is accepted [by the Coast Guard] on the basis of a written agreement which specifies the conditions accompanying the deposits.

The conditions so specified in the agreement executed by plaintiff Pew pursuant to that regulation include, among other, the following [Exhibit A]:

> * * * that this voluntary deposit agreement will remain in effect until such time as the Coast Guard is furnished with a certificate from a U.S. Public Health facility that * * * [Thomas V. Pew is] considered to be fit for sea duty.

5. That, additionally, the regulation (46 C.F.R. 137.10-1(b)) provides that the Coast Guard shall retain the license, certificate or document pending a physical or mental examination as follows:

> The Coast Guard agrees to return the license, certificate or document deposited by the person described therein when he obtains a certificate

> from the U.S. Public Health Service, or other authorized medical officer showing the person is considered to be fit for sea duty.

Implementing that regulatory provision, plaintiff Pew's voluntary deposit agreement (Exhibit A) expressly provides that his document and license will be returned upon presentation of such a medical certification.

6. That annexed hereto as Exhibit B is the letter dated March 12, 1963, from Joel Dasch, M.D., described as the examining physician for States Marine Lines. A copy of that letter is a part of the official records of the United States Coast Guard.

7. That the aforesaid letter states, in part, that on March 12, 1963, Thomas V. Pew:

> was examined * * * and found medically unacceptable for employment * * *.

The letter confirms that a question concerning plaintiff Pew's physical or mental competence did arise subsequent to the issuance of his original license and Merchant Mariner's Document.

8. That he has examined the official files of the United States Coast Guard pertinent to this matter and avers that since March 12, 1963 (the date of the voluntary deposit agreement) neither plaintiff Thomas V. Pew, nor anyone on behalf of the said Thomas V. Pew, ever presented to the Coast Guard a certificate from a U.S. Public Health facility or any other medical authority certifying that the said Thomas V. Pew was

fit for sea duty and that in the circumstances the United States Coast Guard under the pertinent regulations and the terms of the annexed voluntary deposit agreement is not authorized to release the license and Merchant Mariner's Document claimed in the above-styled cause.

/s/ Captain Lynn Parker
CAPTAIN LYNN PARKER

Subscribed and sworn to before me this
27th day of August, 1964.

[SEAL]

/s/ Edward S. Shankle
Notary Public in and for the
District of Columbia

My Commission expires:

September 30, 1967

UNITED STATES COAST GUARD
MERCHANT MARINE INVESTIGATIVE SECTION
U. S. CUSTOM HOUSE
NEW YORK 4, NEW YORK

12 March 1963

Case No. A17-6(MMIS-63207)

I, Thomas V. Pew, residing at Hotel [illegible] 673 Broadway entitlement to New York, N.Y. being holder of (License, Merchant/ Mariner's Document, Certificate of Registry*) No. BK-057927,

and

*(a) having reason to believe that I am presently, physically or mentally unfit for sea duty, or,
*(b) having been informed that I am presently, physically or mentally, unfit for sea duty and in order to avoid a charge of incompetence under the provision of R.S. 4450, as amended and a possible finding of incompetence,

do hereby voluntarily deposit my license # 311543; and MMD # BK - 057927; and Certificate # _____ * with the U.S. Coast Guard Investigating Section _____.

It is understood and agreed that this voluntary deposit agreement will remain in effect until such time as the Coast Guard is furnished with a certificate from a U.S. Public Health facility that I am considered to be fit for sea duty. It is understood that my medical background will be furnished the examining physician.

By accepting this deposit the Coast Guard agrees to return my (License; Merchant Mariner's Document; Certificate of Registry) to me promptly upon presentation of the above certificate from the U.S. Public Health facility certifying I am fit for sea duty.

I agree that during the period my (License, Merchant Mariner's Document, Certificate of Registry) is held by the U.S. Coast Guard, pending my certification as fit for sea duty, I will not accept employment on any merchant vessel of the United States. I further agree that I will not make application to the U.S. Coast Guard for the renewal, issue or reissue of any (License, Merchant Mariner's Document, Certificate of Registry) without stating on such an application that this agreement is in effect.

The above agreement has been read to me, and I fully understand its meaning.

SIGNED /s/ Thomas V. Pew

The above deposit has been accepted by the U.S. Coast Guard.

[illegible]
Signature

[illegible]
Rank

Room #122 USCGT Custom House, N.Y., N.Y.
Address

*The investigating officer will delete from this form any inapplicable language.

Encl 2

STATES MARINE LINES

90 Broad Street, New York 4, N. Y.

Date: 12 March 1963

Officer in Charge
United States Public Health Service

Dear Sir:

Re: THOMAS PEW

Z#: 056927

The above seaman has applied to this company for employment in the Engine Department as 3rd A/E aboard the s.s. GREEN MT. STATE.

The applicant was examined today and found medically unacceptable for employment in this capacity for the following reasons:

Seaman exhibits moderate irregular involuntary movements of the limbs and facial muscles. Respectfully request neurological survey to rule out Sydenham's Chorea.

U. S. P. H. S.

TIME CLOCK

HERE

Very truly yours,

ISTHMIAN LINES, INC.

Joel Darch, M.D.
Examining Physician on behalf of Company

TIME CLOCK

HERE

Signature of examining U.S.P.H.S. physician

SAS/

cc: U.S. Public Health Service (4)
Personnel Department (1)
Examining Physicial (1)

#3

[CAPTION OMITTED]

ORDER AND JUDGMENT

The above-entitled action having come on for hearing on a prior day before this Court on defendant's motion for summary judgment and oral argument of both parties having been heard; the pleadings, affidavit and memoranda herein having been considered, and the Court otherwise being advised fully in the premises, it is hereby

ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment shall be and the same hereby is granted and it is further

ORDERED, ADJUDGED and DECREED that judgment shall be and the same hereby is entered for defendant Commandant of the United States Coast Guard.

Done and ordered this 30 day of September, 1964, at Washington, D. C.

s/ J. Holtzhoff
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cost

NO.19068

THOMAS V. PEW ,APPELLANT

VS.

COMMANDANT, U.S.COAST GUARD,

APPELLEE

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

PARTIES TO THE CASE

FOR APPELLANT:

THOMAS V. PEW, prose

FOR APPELLEE:

JOHN W. DOUGLAS,
Assistant Attorney General

David C. Acheson, United States Attorney

SHERMAN L. COHN,
FLORENCE WAGMAN ROISMAN

Attorneys,
Department of Justice
Washington, D.C.20530

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INTRODUCTION

Inasmuch as at the time of filing appellant(s brief, procedural confusions seemed to exist, appellant is attempting to cover the formal ground of the brief in the reply brief,with statement of the question as follows(Rule 15 of the court rules as to previous statement of points likewise has not been followed,as appellant was expecting petition for stay to be acted on, before stipulating it as brief for appellant):

THE QUESTION

The authorized collective bargaining agent here, the National Marine Engineer's Beneficial Association has due process, because in event of refusal by a company of employment of a marine engineer, the collective bargaining agreement allows him to bring the case to the attention of a Licensed Personnel Board; and a shipping company not only has due process by the above arrangement , but by U.S.Statute, which allows it to bring proceeding for revocation of license upon refusal of a licensed officer to serve;but is not U.S.Coast Guard due process fundamentally lacking, because a U.S. seaman is encouraged by the U.S.Code of Federal Regulations relating to the U.S.Coast Guard, Title 46,in the so called "Voluntary Deposit Agreement", to take an action which if successful could only lead to his own harm, i.e. encouraged to convince the U.S.Coast Guard that he is mentally or physically incompetent, with no actual occurrence or act to substantiate such a claim ?And thus should not any action taken under such a statute or code be ruled illegal and/or unconstitutional, and the way paved for correct due process for the U.S.Government,by allowing appellant to have seaman's license immediately, so as to be able to correctly relate to the union's personnel board?And if the U.S.Coast Guard did not think that this was the correct practice to be followed under its license-contract with appellant, should it not have taken steps for recission of such a contract by some means?

ERRORS NOTED IN APPELLEE'S BRIEF

1. According to United States of Appeals Rule 41(i): "If leave to appeal in forma pauperis is granted, the appeal shall be heard on the original record on appeal. The provisions of Rule 16 (record to be printed in joint appendix) and any other provisions of these rules relating to joint appendix shall not apply to such appeals." However, court rule 17(b(5) says: "The brief of appellany shall contain: A concise statement of the case containing all facts material to the consideration of the questions presented, with references to the pages of the joint appendix if the portions of the record are to be printed; otherwise to the pages of the typewritten record..." The appellee has printed a record, containing portions substantiating his viewpoint, not following above Rule 41(i), but some portions of it can be helpful to appellant here in his reply brief; and so he shall refer both to the original record on appeal and appellee's printed appendix, as well as to his own typewritten record here of vital portions of the original record. And mistakes noted in appellee's brief, as titled above are here noted, the first being the failure to follow court rule 41(i).

2. The very question is incorrectly stated in essence by appellant, in that he states there is a charge of incompetence to be avoided here by appellant, whereas if this were true, such charges would obviously be in the original record, as they are not.

3. The claim of unconstitutionality of certain parts of Title 46, C.F.R., was not even dealt with (in fact, the requirement of court rule 17(c(1(a.) as to stating whether appellant correctly states questions was not followed), and some vital portions of contention are continually stated as fact, e.g. in the appellant's statement of the question itself.

4. Appellee, in supposedly duplicating the original record on appeal, left out vital portions, in fact a portion which would most sustain government due process here. This is referred to in this reply brief as Statement and Appendix.

5. Signature of examining physician for States Marine Lines was incorrectly stated from the original record. It should read: Joel Dasch, M.D. (And the letterhead and subscript to this signature, referring to this steamship company, did not agree in the original record).

6. Although appellant's position in this case has been that the case in the court of

5.(cont.) appeals is a review of an action at law and therefore confined to points of law,he has not received an opinion of the court as to the correctness of this position; and the following errors of fact in appellee's brief are here noted:

A.Page 10(of argument):"Appellant could have awaited formal charges of incompetence ...."This is manifestly incorrect, as stated in point (2.).here.

B.Page 12(of argument):"This is especially true of this particular applicant,who has never worked as a seaman..."Going to sea was the first trade learned by appellant after high school. Coast Guard records will readily verify this, as well as trips taken in trips taken in various parts of the world in capacity of licensed marine engineer.

B.Page 12,(of argument):" The physical examination which appellant passed in September 1962,eight months prior to his attempt to his attempt to secure employment..."The time interval here was five months , as examination of the original record will show.

6.A misunderstanding of cases in admiralty(and a kind of fear of the unknown,not belonging in a case at law) is shown by the statement of Page 12(of argument):
"If appellant's papers were returned to him and he did find work---perhaps by virtue of a less thorough pre-employment physical examination---the employer would be liable for maintenance and cure even though the illness;were pre-existing and appellant's failure to reveal the possibility of Syndeham's Chorea probably would not relieve the shipowner of that liability."

This point is taken up in argument of the reply brief here.

7.ON page 9(a.) of appendix,appellee,in failing to trace the facts of the case to a charge of incompetence,if such charges existed as he claimed, has shown an obviously false document in se (not even considering its unconstitutional or illegal aspects as appellant is doing).This is the actual record, as appearing in the original record, of the voluntary deposit agreement.But it incorrectly states the so-called "meeting of the minds",(though at the time appellant being relatively ignorant of his rights in the case)., between appellant and appellee, or the Coast Guard officer involved, Lt. Comdr. Waranko, which would at the time have recognised part(a.) rather than part(b.) of the form. See conclusion of this brief for a suggestion for easy remedy of this situation.But the fact that I have renounced it here(see appellant's brief) makes it hard for appellant to see its applicability.

JURISDICTIONAL STATEMENT

1. The District Court for the District of Columbia had jurisdiction in this case because of a unique failure of due process in regards to U.S.Government agency action, though with general applicability; the agency being the U.S.Coast Guard. And the authority for this jurisdiction coming from the Administrative Procedure Act, which states:

> "Any person suffering wrong(legal) because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review.....So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or application of any agency action. It shall: Compel agency action unlawfully withheld or unreasonably delayed..hold unlawful and set aside agency action, findings, and conclusions found to be.....unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.."

Page 1(a.) of appellee's appendix shows the original pleading, and shows the thinking to be quite correct at the time, where it is stated by appellant: "Sensible remedies in administrative law having been exhausted.." For if a statute were to immediately come into question, it would be the statute appellant is contesting as showing the lack of U.S.Government due process, the Voluntary Deposit Agreement, thus not accurately placing jurisdiction for this court or the District Court. In fact, that this process could have occurred at all emphasizes the failure of due process as regards the Coast Guard action in issuing a seaman's license, and five months later taking it back solely at the persuasion of the one possibly damaged by the action, the appellant.

Thus the jurisdiction is essentially a hidden one as far as direct relation to statute is concerned, and should be referred to previous decisions, or doctrines of present day law in regards judicial review to be on solid ground. For instance, in the Harvard Law Review, Vol.77, April, 1964, Page 1038 it is stated, referring to a court decision:

> "But the court, though not competent to decide one of the issues, may still have jurisdiction over the cause of action to which decision of the issue is relevant, as si the case, e.g. where the doctrine of collateral estoppel operates." This may well be the correct relationship to jurisdiction to emphasize here, because this would seem to say that because of the collective bargaining agreement here, appellant was actually legally prevented from entering into

the voluntary deposit agreement with the Coast Guard because he had too much at stake in regards his license- contract with same in the collective bargaining agreement, under the National M.E.B.A., of which appellant was and is a member.

Again, on Page 1053 of this same Law Journal, it is stated:

"In cases where an order is directed to future relationships, the decision of that agency which has the major and continuing responsibility should prevail."

This type of thinking as shown in a recent decision could be shown most succinctly in an order of a District Court judge in Glass Bottle Blowers Ass'n of the U.S. vs. Arkansas Glass Container Corp, 183F.Supp.829(1960), where it is stated:

"The court cannot at this time anticipate the decision of the arbitrator both parties have contacted should settle their mutual grievances, so it cannot hold that the defendant will be satisfied with this decision. Even if we assume that the employer will be ~~seeks~~ adamant and refuse to abide by the arbitrators decision(if adverse), this does not exclude the defendant company from carrying out its contractual commitments...the action defendant may be impelled to take if it is dissatisfied with the arbitration decision is left to a future time. Performance of defendant's contract to arbitrate shall be decreed by appropriate order entered upon plaintiff's motion for summary judgment.Jurisdiction will be maintained only to the extent necessary to enforce this judgment."

The first actual "law", as opposed to statute, that appellant would be in the process of relating to here, in the event of another employer refusal of employment would be Section 2 of the Offshore and Intercoastal Agreement , Pacific Coast District(as an example), ~~which includes~~ National Marine Engineer's Beneficial Association, which states:

"There shall be no strikes, lockouts or stoppages of work during the period of this agreement(the most recent appellant has expired June 15, 1964). All disputes relating to the interpretation or performance of this agreement which may arise between the parties to the agreement shall be determined by a Licensed Personnel Board consisting of two persons appointed by the Association and two persons appointed by the employer. The parties shall submit any such dispute for decision by the Board, and they shall agree to be bound by the decision of a majority thereof....In the event the Board becomes deadlocked upon the decision of any matter, the parties agree that the Impartial Arbitrator. who shall act as the fifth memberand Chairman of the Board for the duration of this Agreement, shall be Donald F. Shaughnessy."

An important aspect of all cases of judicial review is the exhaustion of remedy. And in this case the position of the defendant-appellee again is basically unsound.Appellee seems to be insisting on a medical exhaustion of remedy, by insisting on a second physical examination from the U.S.Public Health Service,and believing this is a correct act to be insisted upon in a court of law;appellant from the start has been saying that only by being allowed

to have his license and right to work here and now can be correctly relate to not only the judicial process, but life as he considers it.He feels that cases such as this one have left loopholes in the law which the medical profession has been quick to take advantage of.Even the Japanese, who could set up a medical wail to the world in regards Hiroshima and Nagasaki, have recently decided this. (see the Japanese Journal of International Law, 1964, or the Feb.15,1965, issue of The Nation,describing a similar situation to the present case, where instead of keeping a notoriously medical situation, in Shimoda et al vs. Japan, the Japanese have decided that jurisdictional compensation is the correct way to resolve the problems involved in a legal-medical conflict) Another example of the confusions present here requiring judicial review to show real normative thinking is the fact that since this case has opened, the Bureau of the Budget in Washington has been dipping their hand into long standing United States custom and attempting to relegate seamen's care to a secondary status under the Veteran's Administration by closing U.S.Public Health Service hospitals in various parts of the country rather than strengthening it to meet the strong world-wide competition which a United States seaman is required to face. e.g. the New York Times of Feb. 7, 1965 contains the following:

"The Bureau of the Budget was charged last week by the AFL-CIO Maritime Committee with being motivated with 'anti-social' attitudes in an expanded program to end medical and hospital care to merchant seaman and to close the Public Health Service Marine Hospitals...In the 1963 fiscal year according to Dept. of Health, Education, and Welfare, 2/3 of the 52,346 admitted to the hospitals were seamen.The remaining third were military personnel..."

STATEMENT OF THE CASE

To simplify the statement of the case, appellant will refer to previous documents both correct and incorrect , and add "facts material to the consideration of the questions presented"(court rule 17.b.)5.)) only where necessary.First of all, all facts present in the original plea for writ of error, both in the original record and appellee's appendix are correct. But both the statement of material facts in support of defendant's motion for summary judgment, and appellee's counter-statement of facts are manifestly incorrect, in that both state that a charge of incompetence was to be avoided (under the provision of R.S.4450), whereas the Coast Guard would have no possible means of pressing such a charge;and if they did , knowledge and respect for the methods of procedure under the laws of the United States would require that such charges be in this original record in this case, which they are not.

If the record were read as stated, appellant would be trying to avoid a charge of incompetence, and all he has to do to avoid it is get a certificate from the U.S. Public Health Service, which is not true, but illustrates the reasons appellant has for contesting the constitutionality of these aspects of Title 46, C.F.R. The court will notice an example of the method medical inroads could be made into the judicial thinking in the country, not only by the above facts, but by the spirit of the Code as it is actually written, for instance #137.10-10b)3.), appellee's brief Page 8, where it is stated:

"His rights with respect to a hearing, appeal , and review, are waived,"

though violating the Administrative Procedure Act, the stong basis today for judicial review. The appellee proceeds throughout under the above misconceptions, though otherwise stating the events in correct order, and citing statutes correctly. The important fact that appellant satisfied the physical requirements for licensing of a marine engineer is shown in the original record and the first page of appellant's appendix herein. The fact that he satisfied the mental requirements is shown by the admission of the Coast Guard that they are in possession of the license issued to appellant, which could only be obtained by sitting for an exam requiring 2 or 3 days. The voluntary deposit agreement was entered into in an attempt by the appellant to put some pressure on the employer and attempt to resolve the incongruities presented

in his situation, supposing at the time that the Coast Guard would correctly relate to the situation.Probably both appellant and appellee at the time were in agreement, but subject to basic errors stimulated by illegal medical inroads into pre-existing situations to the accord(without eventual satisfaction) reached in the voluntary deposit agreement.In the hearing before District Court, appellant started on this tangent(before being stopped before his allowed 10 minutes had elapsed) possibly again, and overemphasized a continuing medical aspect of the case, which is discussed in the argument, that is, future recourse for cure if he needs such help in the future. The above represents as complete a statement of the case as is possible now.

STATEMENT OF POINTS

1.The Voluntary Deposit Agreement entered into between the appellant and appellee according to Title 46, C.F.R. §137.10-1 was not only incorrectly written by the appellee, but if it had been correctly formed it would have been unconstitutional because of flagrant violation of the Fifth Amendment to the U.S.Constitution(in regards to due process of law).And appellant's rejection of it (see appellant's brief) makes it impossible for it to be re-formed. The original license-contract between appellant and appellee should thus be followed, which process could only be legally started by appellee immediately returning license to appellant.

2.The correct due process here is the Licensed Personnel Board of the National Marine Engineer's Beneficial Association, which has never been referred to by appellee in any form, written or oral.

3. Executory consideration between appellant and appellee in regards to performance under the license-contract(which is certainly implied yet on the side of the Coast Guard, as appellant undertook his side as far as he was able) would be lost if this case is resolved by a decision of the court that appellant must take another physical examination under Coast Guard procedures before he could work as a seaman.

4.There is a need for more educated and experienced personnel today in the merchant marine,but unless the Coast Guard correctly relates to the judicial process in this country,it will be unduly complicated for such people to use their abilities.

5.The remedy of recission should have been attempted by the appellee if he did not

5.(cont.)agree that a valid license-contract was being dealt with in relations with appellant. Particularly when further performance is due under a contract is this a remedy(see case citation in argument).

6. Not only has appellant's relationship to due process, but a possible future employer's, a shipping company's, is being prevented here, not only as stated in Point 2. here, but by preventing a shipping company from relating to Title LII, Revised Statutes, in regards to registering complaints in conformity with U.S.Statute in regards to seaman-employees.(Statute Cited herein).Inasmuch as American Law relates to Stipulation for a Third Party(and California Civil Code, s. 1559, provides that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it), this point is particularly important.A principle of such relationships, mentioned in Stipulations for a Third Party, by Gilbert W.F.Dodd,Barrister at-Law, London, Stevens and Sons,1948, is that the recipient of the promise(here, appellant from appellee), i.e.the stipulator, is at the time of the contract and remains throughout the creditor of the promisor and co-creditor with the third person(here, the shipping company) for purposes of enforcement thereof;and also, the other contracting party, i.e.the promisor(here, the appellee) remains the debtor throughout of the third personand for the purposes of enforcement of the stipulator as well.

7. The fact that the seaman has a unique place in American Courts, and is uniquely supposed to be able to look after himself, both in regards to hurting himself or others, has been completely overlooked here since the time of refusal of the Coast Guard to return license to appellant upon request, irrespective of the illegality of the original accord as to the voluntary deposit agreement.The appellee's brief even goes in the reverse direction and speaks of gross inequities which must be involved in this case because of future damages which might occur under this setup(see argument).

8. Appellant, after becoming aware of such statements as reported in the New York Times of April 19, 1964, by an Assistant Surgeon General of the U.S.Public Health Service that, "The Public Health Service never has certified a seaman as fit for duty for a aparticular job on a particular vessel" feels that unless the U.S.PH.S. is strengthened, that the funds available to the N.M.E.B.A. could more correctly be used in any relationship to the

fit for duty situation as well as other medical situations, which would and does show a great lack in "administrative remedy" in this case.

9.Though plaintiff-appellant's Position as to damages in a case does not determine the court's, appellant here wishes to state his belief that law has probably not yet come far enough in this country to put a monetary tag of damages to himself;and that remedy of specific performance coming into play where action for damages is insufficient, he wishes the latterremedy stressed, and says that only by performance as a marine engineer on the present license -contract with the appellee will the question of damages be correctly resolved.This will also more correctly resolve the medical-legal conflict in the case.

SUMMARY OF ARGUMENT

Very basic relationships, both in regard to the Constitution of the United States and normal thinking in regard to employment in general, and employment of seamen in particular, have been lacking from the moment seaman-appellant here went to the Coast Guard instead of the union hall to resolve a difficulty regarding a refusal of employment by a shipping company in New York City.Seaman, after being reissued a seaman's license after a lapse of a few years, and going to work , sent from the authorized bargaining agent here, the N.M.E.B.A.,to a company in response to the latter's call&, as soon as possible after sitting for the license and passing all requirements of the U.S.Governmentk and its authorized agency, the U.S.Coast Guard, was refused employment after a cursory physical examination by an agent of the shipping company, a medical doctor. The Coast Guard was possibly respecting the independence of the seaman, though allowing an illegal accord, in coming to the voluntary deposit agreement in an attempt to resolve the difficulty;but they were certainly not when they refused to return the license to appellant when he asked for it and renounced the accord.The dates here were :License exams passed, Sept., 1962. First employment sought, Feb.,1963.Voluntary Deposit Agreement, Mar. 12, 1963. License asked returned, Nov.1963. Plea for writ of error, U.S.District Court,June, 1964.The court may wonder at the cause of two lapses in the above time cycle, that between Sept. 1962 and Feb., 1963, which was caused by a longshoremens strike, and that

between Nov. 1963 and June, 1964, during which time appellant had asked a U.S.Senator who had known his father to look into the situation quietly-and a failure to receive an answer by mail delayed this action two or three months.Time enough was not allowed in District Court for presentation of arguments, and in fact appellant had civil subpoenas in hand at the time for medical records not only from the U.S.Public Health Service, but another company(which operates tankers) from which he had passed a physical examination in the last 3 or 4 years in New Jersey, when the motion of defendant for summary judgment was granted.The arguments presented in this brief should be clear enough not to require another hearing now, and appellant is suggesting that Lt. Comdr. Varenko , who entered into the accord known as the voluntary deposit agreement with the appellant be consulted before time for hearing if required by law as to the wisdom of his own judgment therein, so that the case may be dismissed according to court rule 21, thus avoiding bad publicity.

ARGUMENT

The issues in this case have been so fundamental to jurisdiction and other basic issues of law, that most of the argument has been already effectively presented.And following this same line of thinking, a classical argument should be here presented, particularly as even the Justice Department has not understood these arguments in its defense for appellee.The very cases cited in appellee's brief as aiding the defense actually aid the position of the appellant .Of course, the Justice Department could not here force the remedy of recission, strong as it may be(as is shown by Time for Recission and Laches being considered under a single heading in West's Federal Practice Digest, and such cases as City and County of San Francisco vs. Transbay Construction Co., which says:"The California Statute requiring a party to rescind a contract promptly upon discovering facts which would entitle him to rescind, if free from duress, undue influence, or disability, and is aware of his rights, is strictly applied."(134F.2d468,320U.S. 749), or if there is some confusion here between remedy of recission and accord without satisfaction, 99U.S.578 says:"The burden of proving knowledge of the fraud and time of its discovery rests upon defendant who seeks to defeat the right of the other party to the contract to rescind or affirm the contract on the ground of delay in taking action."), though appellant is using it as a point of argument, but they should be able to force a settlement as to the affirmation of the license-contract , signed by a Coast Guard Commander and appellant in New York

City at the Custom House .But in their arguments in appellee's brief they seem to not want to consider a seaman's case in law as requiring fundamental discernments. There only basic argument(aside from all the quoting of technical material) seems to be that gross inequities will result if a seaman who has not gone to sea for some years were to put a sudden strain on medical facilities available to seamen, or hurt himself on duty and require monetary compensation from a shipping company, not realizing that they are talking purely about a lapse of time, and saying that United States Courts of Law would not be able to resolve such"inequities" in the normal procedures available to the sea man, who is continually dealing in great distances or lengths of time. And by this argument they are putting an extra obstacle in the way of older more intelligent persons who may care to sail a few voyages in the light of national defense, etc. In fact, in the New York Times of Feb.28, 1965, is reported an article that Norway, long a seaman's country, and other Scandinavian countries are urging that "international standards be set for recruiting and that age limits be raised so that only those mentally and physically fit can go to sea". And they are stymied also by the medical conflict, not realizing, for instance, that in a Court of Appeals case in Pennsylvania(Potter Title and Tryst Co. vs.Ohio Barge Line)and 46U.S.C.A.§688, "A private maritime employer has no general affirmative duty to satisfy himself of the physical competence of a crew by requiring a seaman to take a physical examination before embarking in absence of statute." The really enlightened shipping company would be thinking in terms of the argument in Point 6. of Points herein, in terms of Title LII, REvised Statutes, which old as it is , is still on the books.In Section 4449, this Statute says:"If a licensed officer, to the hindrance of commerce, shall wrongfully or unreasonably refuse to serve in his official capacity on any steamer, as authorized by the terms of his certificate or license, or shall fail to deliver to the applicant for such service at the time same shall be demanded at the time of such refusal a statement in writing assigning good and sufficient reasons therefore...his license shall be revoked upon the same proceedings as are provided in other cases of revocation of such licenses."

The above outlook would properly put more power in Statute rather than agency action, if followed, if properly related to the Coast Guard. There was a case in the Court of Appeals of California in 1960 , quoted in the Federal Register as C.A. Cal.1960,which said:"Where Coast Guard officers threatened to rule a seaman off the sea without a hearing and solely on the basis of earlier void determinations, such threatened action was an abuse of power and seamen were entitled to injunction, even if the threatened exclusion was calculated to remain effective only for such time (months or years)as the Commandant might take to get around to action...."Appellant is relating to the collective bargaining agreement herein, but is relating to the future

and attempting to straighten out the thinking of appellee here as well.The U.S.Navy has no such flexibility in regards to going to sea;their programs for former seamen ashore is limited at present to weekly Reserve meetings for men working full time on other jobs.But this is no sign that merchant seamen should be stymied by attempts to classify both in the same category,as was previously mentioned as being tried by the Bureau of the Budget, in regards to hospitilizations. And they should not be stymied by inabilities of the Coast Guard either to keep up with events or happenings which they did not happen to see themselves, as for instance the fact that while the aforementioned longshoreman's strike was going on , appellant was teaching school in New Mexico, and skiing in Colorado, etc., before he attempted to ship out after the strikes or to keep up with correct judicial thinking in this country.

The,or at least a, classic decision in this regard was Lindquist vs. Dilkes, (1942) 127 F.2d21,where, starting on Page 22 of the Fed. Supp.(2nd Edition), the District Court Judge said:"Shipowner's liability does not follow a seaman's illness or injury.If these occur after the commencement of the voyage and are in some measure the result of the sailor's own deliberate acts, hee suffers the consequences.We used the qualified in some measure8 because the cases exhibit a certain looseness of expression. Some of them stress morals rather than economics and judge the act by their view of its viciousness(263 F.1007,78F.2d819,88F.2d125,4IF.Supp.395).Others adopt the descriptive phrase of the cognate Compensation Acts(22Calif.Law Review432, 10Mich. State Bar Journal 121....), and speak of willful misconduct(100F.2d604).When the physical condition precedes the employment(maritime), the courts do not seem interestedin its origin.The seaman can be said to warrant his own fitness .Some cases use such language(58F926;27F.2d 182).The shipowner can be compelled to take his 'hands' as is.This is the court's interpretation of the Longshoreman's Act(33U.S.C.A. #901et seq102 F.2d 464, 5F.Supp.321, 34F.Supp.321, 34F.Supp.486, 39F.Supp.177).Or, as a sort of middle ground, the seaman's mens rea can be the test.If , for instance he has lied to his captain(prospective),he should be, and is, left to his own devices(17Fed.Casc1305, 30 Fed.Cas.718)....We think the relationship with his ship of so favored a servant as a seaman is closer than that of the insured and the insurance company.Both the shipowner and the insurer assume an obligation whose burden may depend on the physical condition of the insured and the seaman;the company gets a cash consideration, the shipowner a contented mariner.

If this sound, the sailor's duty is to disclose whatever he as an ordinarily prudentperson should have known is material to the risk. It might be argued that the withholding of any information (medical) either known or reasonably to be known is fatal.This on the theory that its significance is left to the judgment of the insurance company or employer. The cases in our particular field of law do not go so far. We think correctly because after the employer or the insured can quite easily ascertain the necessary information by proper inquiry.The risk, of course, is that the seaman may be unable to continuehis work through illness...."

Indeed, if appellee had read the Jones Act, Title 46, U.S.C.A. #688,he would have seen this spirit implied in this basic act relating to injuries to seamen.The law is worded:"Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law,with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy incases of personal injury to railway employees shall apply...Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."And the cases quoted under this act would do nothing but sustain this viewpoint of the independance of the seaman.For instance, in Johnson vs. U.S.,74 F.2d 703,It was stated:"Seaman who in rough weather knowingly attempted to go to messroom over exposed well deck instead of through the shaft tunnel and was swept overboard assumed risk of such course".And Borgerson vs. Skibbs,156 F. Supp.282, it was stated:"Where it was libellant's election to try to reach lock nuts without the aid of planks customarily used for such work inside cylinder that caused him to overreach, and so lose his balance, he could not recover." Bassett vs. the City of New York , D.C.N.Y. 1936, 13F.Supp.1022, states:"Employer was not liable for injury to marine oiler sustained while removing grease from moving machinery, in response to a general order of the chief engineer, as he had done for two years, since risk attached to the work was assumed by him as incident to his employment."These examples, which follow general principles which are nowhere violated in Federal cases should assay the fears of appellee as to"gross inequities".But the argument carries further.Section 138 of the Act quotes a ruling in De Zon vs.American President Lines , 318 U.S.660(1945), and Buguero vs. U.S.Shipping Board Emergency Fleet Corp.(1926), 218 N.Y.S588) , as saying:"Under this section, Congress has afforded a seaman a modified common law remedy for negligent injury in which the fellow servant defense is done away with."And seaman's releases of damage claims have particular power, as it stated in Fardy vs. Roen Trans. Co., D.C.Mass.1956,139 F.Supp.167;"Seaman's releases are properly unstable, but not to the extent that they may be set aside by merely showing at some future time that the consideration for the release proved to be inadequate."

Thus, appellee has a mass of Coast Guard technical matter in his brief, but has failed to bring out a sustaining argument to support his position.The pure original record itself , with its incongruities , should be enough to give judgment for appellant, and order the Coats Guard to return seaman's license to appellant and give it its true value as a license-contract. and overcoming the subsequent accord without satisfaction known as the Voluntary deposit agreement,

Considering this accord as a temporary meeting of the minds , capable of being cancelled on consent of the Coast Guard maker, Lt. Comdr. Varanko, after repudiation of appellant, would give this case more stature, and not further degrade the U.S.Government and a court of law as to not knowing what constitutes a real record in a case.This is the suggestion of the appellant, and upon returning license to appellant he would arrange for a tearing up of the accord, and agree to settlement according to court rule 21:"Whenever, prior to argument and after a case has been docketed in this court, the appellant and appellee shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the appeal or petition for review, appeal, or enforcement, to be dismissed, and specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, it shall be the duty of the clark to enter such dismissal, to transmit forthwith a certified copy of the agreement to the lower tribunal, and on payment of the prescribed fee to furnish to either party requesting it a copy of the agreement filed;but no mandate or other process shall issue without an order of the court."Unless the District Court wished further investigation on its own, this would be the most efficient resolution of the case, It would merely require an order of the District Court releasing the record , probably, and the license not being in the record would merely require that it be in possession of appellant before above arrangement is made. If the above procedure is not followed, there is not enough evidence in the case to need any other judgment of the Court of Appeals than specific performance on the license-contract, if at plea of appellant, according to the normal collective bargaining relationships involving the shipping company and the N.M.E.B.A., AS FAR AS HE can see.And so he asks that the above be followed.

/s.Thomas V. Pew , appellant
Case 19068

April, 1965

STATEMENT AS TO APPENDIX

The record as contained in the appellee's brief corresponds to the original record from District Court, except as previously noted, and with the following two exceptions, which appellant causedto be placed in the record, and represent true facts relating to the case:

(Notice of Appeal presumed accepted as being in original record)

APPENDIX FOR APPELLANT,

CASE NO. 19058

PUBLIC HEALTH SERVICE

U.S.Public Health Service
Outpatient Clinic
67 Hudson Street
New York 13, N.Y.

Oct. 14, 1963

Re:Thomas V. Pew
673 Broadway
New York, N.Y.
(in 1962)

Born 5/11/26 in
Minnesota

Our File 184 848

Filed
Sept. 14, 1964
HarryM. Hill,
clerk

Lt. Comdr. Varanko
U.S.Custom House, Room 122
New York, N.Y. 10004

Sir:

The above named has requested that we forward to you the following information of his examenation done at this clinic on Sept.19, 1962.Mr. Pew's authorization for examenation was CG 954.

Pulse 26. Blood Pressure 120/80. Hearing normal.P/Pnormal.Vision left eye20/20. right eye 20/20.

Photofluorograph of chest:Nom significant abnormality. Urinalysis:specific gravity 1.018.Albumin, negative.Sugar, negative.Microscopic 1-2 WBC.

STS:VDRLand Mazzinimon-reactive.

The examining dbctor declared Mr. Pew medically passed.

Sincerely Yours,

(copy)

Robert M. Hartley,
Medical Director.
Medical Officer in Charge

cc:1R.Thomas V. Pew
10413 Tullymore Road
Adelphi, Md.

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA DISTRICT

Filed Sept.17,1964

PRAECIPE (copy)

The clerk of said court will request subpoena of U.S.Public Health Service for physical examination of Oct. 15, 1962 of plaintiff, signed and notarized by present director(at time, as in evidence submitted by plaintiff,director was Dr. Hartley, M.D.). A notary is on premises, but on request by plaintiff today, with explanation of court action , was refused by Dr. Buskolich, Administrative Director.

(Judge Holtzoff is
Motions Judge)

/s/Thomas V. Pew
673 Broadway
New York, N.Y.

IN THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

THOMAS V. PEW, APPELLANT
VS.
COMMANDANT, U.S.COAST GUARD,
APPELLEE

CIVIL ACTION NO. 1547-64
(Court of Appeals 19058)

PETITION FOR REHEARING(JUNE 1, 1965)

1. Jurisdiction.

A. U,S,Court of Appeals, D.C.Circuit Rule 26:"A petition for rehearing may be filed with the clerk, when accompanied by proof of service on the adverse party, within 15 days of judgment or decision unless the time is shortened or enlarged by the court or a judge thereof.....It must briefly and distinctly state its grounds , and be supported by certificate of counsel to the effect that it is presented in good faith and not for delay. A petition for rehearing is not subject to oral argument, unless ordered by the court."

i/.Appellant pleading pro se here, and so without counsel, certifies that the above petition is presented in good faith and not for delay.-

B.Appellant received a copy of judgment in the case today, dated May 28, 1965?

2/Points

A.If mandate issues from this court corresponding to above judgment,Commandant, U.S.Coast Guard will be standing behind the Voluntary Deposit Agreement with appellant here, both as to truth and format, with no possibility of pleading mistake of negligence in its making, though it has been the principal subject of dispute in this case.

B.The record of appellant will thus of necessity show incompetency on record with the U.S.Coast Guard.

C.Appellant being in the prosecutory position in this case, extending over almost a year, will not expect the Department of Justice to take over this position in regard to any facts or procedures of this case.

D.Appellant believes that both in this case, and by the "ease" with which the voluntary deposit aggreement was drawn up in New York,probably in many other cases, violations of U.S.Statute are occurring regarding the truth of official U.S.Government documents, but he wishes to keep the case on a civil plane here.

E. By the principle of res judicata, the facts and procedures of this case will be presumed as correctly noticed by this or any other court, in future actions of U.S.Seamen.

F.Likewise,"Res judicata requires that parties and their privies be the same as in prior action, and that there be absence of fraud or collusion(199 F.Supp.478."

G.Likewise,"Rule of res judicata is based upon public policy which requires that a single controversy which is capable of being completely determined in one suit be ended by judgment in that suit and not become subject matter of subsequent litigation.Engelhardt Vs. Bell and Howell 214 F. Supp.195."

H. By the criminal principle of malum in se, an entire document is contaminated with that which is bad and becomes unenforcible(see Grover Vs. Merritt Development Co., 47 F.Supp309).Appellant has repeatedly challenged the above voluntary deposit aggreement here, in place a). as here cancelled,because of encouraging flagrant self incrimination, and in place b.), as here written, because of plain incorrectness, and as suggesting probable frequent similar violations by the Coast Guard.He considers it subject to action by a court of law as "malum in se".

I.In summation(see Georgetown School of Law Journal, Sp. 1964, Pg. 570), according to Antoine Favre, Judge of the Swiss Federal Tribunal, "As a general rule the State is responsible for the non-observation of its obligations due to the fault of its agents. It is enough that the injured party prove objective fault, namely a violation of the standard norm of diligence;subjective fault is only a factor in the assessment of compensation."Appellant hopes the court considers him to have the commonsense to be able to correctly

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PETITION FOR REHEARING(PAGE 2)

2. Points (cont),I.(cont.)
interpret and act on this statement, as far as loyalty to the UNited States is concerned.

3.Appellant therefore requests that a new hearing be had in this case, with new briefs allowed to be filed in normal sequence by both parties, in this civil action.

/s/Thomas V. Pew, Appellant

cc:Affidavit of service on
Commandant, U.S.Coast Guard,
and U.S.Department of Justice

IN THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

THOMAS V. FEH, APPELLANT
VS.
COMMANDANT, U.S. COAST GUARD,
APPELLEE

CIVIL ACTION NO. 1563-64

Appellant's Brief

PETITION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI FROM U.S. SUPREME COURT

Preface. Appellant having failed to realize that Rules 75 (a.-g) of the Federal Rules of Civil Procedure were no longer in use in this court wishes his Designation of Points of Record removed from the record; and furthermore deciding that the case now being presumably confined to questions of law (being a review of action at law), a further amplification of issues at law should be had. And inasmuch as the Supreme Court may completely review jurisdiction, fundamental issues will be raised and answered.

"Where case is before Supreme Court properly on constitutional grounds, the jurisdiction of that court extends to a review of all questions". James Dickinson Farm Mortgage Co. Vs. Harry, Ill. 1926, 273U.S. 119.

1. Jurisdiction.
   A. Title 28, #1254: Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
      1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after judgment. (presumption by appellant that "before judgment" means as far before as possible).
   B. Federal Rules of Civil Procedure, Rule 75(j.) (excerpt): "At any time before docketing of the appeal, a party may have the clerk of District Court transmit to clerk of the Appellate Court such portions of the record as may be desired for ...an intermediate order...(Such order is on separate paper).
   C. Supreme Court Rule 39: Proceedings to bring up to this court on writ of certiorari a case pending in a circuit court of appeals or the U.S. Court of Appeals for the District of Columbia before judgment is given in such court should conform as near as may be to the provisions of Rule 38 (dealing with method of presentation of issues). That the public interest be promoted by a prompt settlement in this court or the questions involved may constitute sufficient reason."
   D. Though there is nothing in the Supreme Court Rules of a case In Forma Pauperis as is the present one, it would seem to be a rule of common sense that one form of pleading would have no particular guarantee of lack of complication or freedom from error. Also, consistency of system would seem to allow such an appeal. And the fact that possible damages to the United States are increasing each day that decision is not rendered by court make Supreme Court Rule 39 (above) applicable at least in a negative sense of prevention of further damages if not more positive considerations appearing herein. There is an inherent seriousness in any case where the United States reverses itself or shows the possibility therefore. And finally, an appeal In Forma Pauperis would by nature contain many hidden rights possibly requiring special discernment of the U.S. Supreme Court.
   E. To further clarify fact of jurisdiction not being with U.S. Coast Guard (aside from no provisions for hearing under Title 46, C.F.R. in the present case, as will be brought out later). "In a bilateral contact (such as the present agreement between the appellant and appellee termed 'Voluntary Deposit Agreement') the obligation of one party may be discharged by breach of contract of the other party...Similarly, the absolute and unqualified refusal to perform entitles the other party to treat such refusal as a discharge". (Modern American Law, Blackstone School of Law, Chicago). And appellant now states that he has no intention of carrying out his part of the agreement. And without particular ruling on the constitutional issue presented as to the Voluntary Deposit Agreement (particularly without hearing possible by statute), and

IN THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

THOMAS V. PEW, APPELLANT ** VS. ** COMMANDANT, U.S. COAST GUARD, ** APPELLEE

CIVIL ACTION NO. 1547-64

PETITION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI FROM U.S. SUPREME COURT (Pg. two)

1. Jurisdiction (cont.)
E. special insight, the court may be forced to rule on evidence over which it has no control as to truth (since appellee's evidence consists of a report of a private company's agent, a medical doctor).

2. Possible Objections to Jurisdiction (as normal intermediate step of filing of briefs would be omitted if stay were granted) with answers:

A. Contention: "A major reason for creation of administrative agencies is the greater ability for weighing the intangibles resulting from specialization, insight gained through experience, and more flexible proceeding". U.S. App.D.C. F.C.C. vs. RCA Communication 345U.S.86,7L. Ed. 1470
Answer: In most cases similar to this one (Pew vs. Comm.C.G.) there is statutory provision for rules the agency may or must follow in case of need of hearing. In the present case, there is no such provision. The only due process here is under Title 46,C.F.R.,Subpart 137.20(Hearings), which states:
" 137.20-1(a.) A hearing in a suspension and revocation proceeding conducted under Title 46,U.S.C.A. section 239 or 239(b.)(cases of marine casualty or accident or narcotics violation only) is the adjudication of the case." The U.S. Government and its agency, the U.S. Coast Guard being at fault here may further be seen by not only the violation of the basic essence of due process (with the mental torture which goes with it), but by the possibility of damages to the United States starting whenever a seamen's document would be taken as it was in this case, with no chance of the United States forcing accruing until expiration of the license (damages as to loss of right to work, time, etc.).

B. Contention:
"One is not entitled to judicial review until prescribed administrative remedies have been exhausted". McCauley vs. Waterman S.S.Co. 327 U.S.540, 90L.Ed. 839.

Answer: "The presence of constitutional questions, and showing inadequacy of administrative remedy (inadequacy shown by Coast Guard wanting further reinforcing of pre-existing valid evidence, on basis of cursory examination of private company's agent, a medical doctor, as well as other reasons brought out here), and of threatened or impending irreparable injury flowing from delay incident to following prescribed administrative remedy, may be sufficient to dispense with exhausting administrative processes, but such rule is not one of mere convenience or ready application". Aircraft and Diesel Equipment Corp. vs. Hirsch, 331 U.S. 752,91 L. Ed.1796. The presence of lengthy increase of damages to the United States is shown in the case here, and necessity of court's rendering and understanding due process requiring constitutional issues (unless the Coast Guard merely wishes to return license to appellant) and making decisions thereon is also shown. This may be more clearly seen perhaps by supposing that due process (as contended by Coast Guard) were carried out and appellant were found "not fit for sea duty" by the U.S. Public Health Service Appellant contends that the same decision as to refusal of his license of Nov. 1963, or even in the initial taking of it with no evidence of marine casualty or accident or narcotics violation, would remain for the court.

C. Contention: "Whenever a 'barrier' to granting plaintiff's claim due to fact that orders are sought which might frustrate ultimate determination by agency to which Congress gave exclusive responsibility becomes apparent, Court is bound to dismiss". Ruby vs. American Air Lines 323 F.2d246, Cert. denied 376U.S. 913, 11 LEd.2d611.

IN THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

THOMAS V. PEW, APPELLANT **
VS. **
COMMANDANT, U.S. COAST GUARD, APPELLEE ** CIVIL ACTION NO. 1547-64

PETITION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI FROM U.S. SUPREME COURT (Pg. three)

2. Possible Objections to Jurisdiction, with answers (cont.):
Answer: "Dismissal of action in which doctrine of primary jurisdiction is invoked (is in order where court is not in position to grant relief, whatever agency decides; but where, because of limitation of agency's power further resort to court is likely, retention of jurisdiction may be proper". McCleneghan vs. Union Stock Yards Co. of Omaha,298F.2d659.
(Resort to court could be had later, at time of expiration of license, if definite action or decision were not taken now).
D. Contention:"The term 'substantial evidence' is a term of art used to describe the basis on which an administrative record is to be judged by a reviewing court, and such standard goes to the reasonableness of what the agency did on the basis of the evidence before it, and a decision may be supported by substantial evidence even though it could be refuted by other evidence not presented to decision-making body". U.S. vs. Carlo Bianchi Co. 373 U.S. 709, 10L.Ed.2d.652.
Answer: At time of request for return of license by appellant, Nov. 1963, confusion probably existed in the mind of the Coast Guard as to its ability to legally sustain the license, particularly because at this point Federal evidence was being relied upon by the demander but not by the demandee. But not wanting to reverse itself was probably the major consideration. An appeal being now allowed here opens the way to a clear determination of truth.
E..Contention: "Administrative agency must confine itself to record before it and afford opportunity contrary to material facts of which official notice has been taken". Adm. Proc.. Act #5(d), 5 U.S.C.A.#1006, N.L.R.B. VS. JOHNSON 310 F.2d.550

Answer: An opportunity was afforded the Coast Guard to call a hearing if this had been possible at time of request for return of license, there being a presumption implied that previous voluntary deposit agreement was not going to be followed, preparatory ro further legal investigation. As mentioned previously here, there is nothing in Title 46, C.F.R., which would have given appellant idea that hearing could be had; it would certainly have to have been initiated by appellee. (Further showing incorrectness of statute of voluntary deposit agreement, the basis of Coast Guard's case in opposition so far.)

3. Basis of Jurisdiction for Writ of Certiorari.
A. As noted in above in Points 1. and 2.
B. Administrative Procedure Act.
1) Section 2. " 'Agency' means each authority (whether or not within or subject to review by another agency) of the government of the United States, other than Congress, the Courts, or the government of the Possessions, Territories, or of the District of Columbia".
2) Section 10(a). Right of Review. "Any person suffering legal wrong because of any agency section, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review. sec.(c.): "Every agency action made reviewable by statute and every final agency action from which there is no other adequate remedy in any court shall be subject to judicial review." Sec.(s.): "Scope of Review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or application of any agency action. It shall: A. Compel agency action unlawfully withheld or unreasonably delayed.. B.etc. Hold unlawful and set aside agency action, findings, and conclusions found to be....(6)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court....

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THOMAS V. PEW, APPELLANT

VS. **

COMMANDANT, U.S. COAST GUARD APPELLEE ** CIVIL ACTION NO. 1547-64

PETITION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI FROM U.S. SUPREME COURT (Pg. four)

3. Basis for jurisdiction for Writ of Certiorari: (cont.)
   A. The appellant feels, as stated in the record, that this case is of unusual interest in the light of national defense (particularly as to a great number of former seamen ashore who would run into many of the complications shown here if attempting to "brush up" seagoing thinking not used for 10 years or more. The U.S. Navy provides non-compulsory programs ashore for many of these pesons; the appellant here resigned his commission in the U.S. Naval Reserve, at the suggestion of the U.S. Navy, at the time of the Korean War, when he was in study for the Catholic priesthood. (U.S. Statute provides draft exemption for holders of marine licenses such as is in litigation here, if such holder is competent to stand watch on a merchant ship. (As appellant was at the time of above action by the U.S. Navy.)..

   B. The appellant also feels that this case is of unusual national interest because of the violation of due process shown in a very crucial area of national concern, and causing much mental distress to many. "Self incrimination, though it may be said that a "man" should be able to handle it, should not be encouraged by statute, or condoned outwardly in any form. For instance, in Cramp vs. Board of Public Instruction, Florida, 368U.S. 278, Mr. Justice Stewart said (opinion of the Court): "We think this case demonstrably falls within the compass of those decisions of the court which hold that..... A statute which either forbids or requires the doing of an act ((here concerning a loyalty oath)) so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential of due process of law".

4. The above points of jurisdiction present the issues and reasons for the request for stay. Appellant wishes the above handled as summarily as possible, and will request summary docket.

5. On separate papers:
   A. Affidavit of service of above on U.S. Attorney, U.S. Department of Justice, and U.S. COAST GUARD.
   B. REQUEST from court that papers be transferred (i.e. Record of case) from Appellate Court to Supreme Court, pending petition being granted (above)..
   C. Request of clerk of District Court that record of case be transferred to Appellate Court, following F.R.C.P. Rule 58(j).